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In the Supreme Court of the United States

OCTOBER TERM 1975

No. 75-91

LOUISIANA AFFILIATE OF THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS (NORML), ET AL
Petitioners

VS.

HONORABLE WILLIAM J. GUSTE, JR., ET AL
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

Petitioners herein filed a complaint in the U.S. District Court for the Eastern District of Louisiana on January 21, 1974. The complaint sought the convening of a three-judge court pursuant to 28 U.S.C. § 2281, et. seq., and declaratory and injunctive relief against the constitutionality and enforcement of LSA-R.S. 40:961, et. seq. and 21 U.S.C. § 801, et seq. These statutes make criminal the private use and possession of marijuana by adults. The District Court, Comiskey, J., held that plaintiff's complaint stated no substantial constitutional question and denied the request for a

three-judge court. From this dismissal, plaintiffs appealed. The Fifth Circuit affirmed per curiam, expressly approving what it termed the "well-reasoned" opinion rendered by District Judge Comiskey, 380 F. Supp. 404. From this background arises plaintiff's petition for a Writ of Certiorari.

ISSUE

It is respectfully submitted that the only issue of any moment herein is whether the plaintiff's complaint stated a constitutional question of sufficient substantiality to necessitate the convening of a three-judge court.

ARGUMENT

I.

Petitioners contend that the right to possess marijuana in the home emanates from the First Amendment right to privacy, and by close association therewith somehow achieves the status of a fundamental right which they argue is guaranteed by the Constitution. Additionally, petitioners argue that the State and Federal statutes regulating possession of marijuana are not founded upon a compelling state interest which is necessary to empower the State to infringe upon this so-called fundamental right. In support of this contention, petitioners cite *Stanley v. Georgia*, 394 U.S. 557 (1969), which included possession of obscene materials in the home among those activities protected by the right to privacy. The District Court, however, refuted petitioner's interpretation of *Stanley* by quoting the

following *caveat* contained in the *Stanley* opinion: "What we have said, in no way infringes upon the power of the State or Federal Government to make possession of other items such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberty protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal." *Stanley*, footnote 11 at 394 U.S. at 568. In *Roe v. Wade*, 410 U.S. 113 (1973), this Court pointed out that "only personal rights that can be deemed 'fundamental' in the concept of ordered liberty are included in this guarantee of personal privacy." *Roe* at 410 U.S. at 152. This class encompasses such rights as marriage procreation, contraception, the right to receive ideas, and others. *Roe*, 410 U.S. at 152, and cases cited therein. Clearly, the right to possess marijuana is not, at this point in time, subsumed under these rights. In the light of these decisions, to so include said right would defy logic. The District Court refused to classify the possession of marijuana as a fundamental right. When fundamental rights are not abridged, a statute must be clearly shown to have no rational basis in order for a finding of unconstitutionality to result. Every possible reasonable basis which might support the statute must be negated by the party attacking the statute. *Osborne v. Ozlin*, 29 F. Supp. 71, affirmed 310 U.S. 53. In the instant case, it is readily apparent from the current state of scientific evidence pertaining to marijuana

that a rational basis for legislative prohibition of the drug does indeed exist. See, e.g., "Hearings on the Marijuana-Hashish Epidemic and its Impact on United States Security" conducted by the Committee on the Judiciary of the United States Senate, May, 1974. It is conceded that much evidence has been adduced which indicates that marijuana used under certain conditions, is not harmful. On the other hand, the above cited hearings disclosed an equal, *if not greater*, amount of equally valid scientific evidence condemning the use of marijuana. The net result is such that the legislature must draw conclusions on the basis of what it deems wise, considering all available evidence. Petitioner is, in effect, asking the Court to draw an opposite conclusion from the same set of facts which prompted the legislature to proscribe possession of marijuana. In *U.S. v. Drotar*, 416 F. 2d 194 (5th Cir. 1969), a similar question was presented: "The appellant has cited us to an extensive list of scientific authorities supporting his contention that marijuana is neither addictive nor harmful; the government has cited us to an extensive list of authorities to the contrary. This, it seems, is a fair indication of scientific opinion on the matter at the present time". It is well established that when such a situation exists, the decision of the legislature is not to be judicially overruled if a reasonable basis exists for the statute. When faced with a similar dichotomy of opinion involving obscene matter and its effects on society, this Honorable Court said: "We do not demand of legislatures 'scientifically certain criteria of legislation'. Although there is no

conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such connection does or might exist . . . . From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs". *Paris Adult Theatre I v. Slaton*, 413 U.S. at 61 (1973). In *Rener v. Beto*, 447 F. 2d 20 (5th Cir. 1971), the defendant attacked the Texas marijuana law, claiming no rational basis therefor existed. The Court, in upholding the conviction and statute under which it was obtained, said: "Our standard for reviewing the statutory scheme used in Texas for controlling drugs is not whether it is wise or desirable. Legislatures have been given wide powers of discretion when it comes to classifications in the adoption of police laws and it is limited only when such classification is without *any reasonable basis* . . . . We are unable to say that the Texas legislature acted arbitrarily or without a reasonable basis when it classified marijuana, together with addictive drugs, as a narcotic". *Rener*, 447 F. 2d at 22, 23. The general principle that the judiciary shall not substitute its judgment for that of the legislature where a rational basis exists is given voice by this Court in *Ferguson v. Skrupa*, 372 U.S. 726 (1963): "Under the system of government created by our Constitution, it is up to the legislatures, not courts, to decide on the wisdom and utility of legislation . . . . We have returned to the original constitutional proposition that courts do not

substitute their economic beliefs for the judgment of legislative bodies, who are elected to pass laws" (372 U.S. at 729, 730).

For the foregoing reasons, the State of Louisiana respectfully submits that due to the current state of scientific knowledge regarding marijuana, it is not possible for petitioners to show clearly that no reasonable basis exists for the posture of LSA-R.S. 40:961 et. seq. and 21 U.S.C. § 801 et seq. Accordingly, the wisdom and utility of these statutes are not properly drawn in question by the courts; as a result, no substantial constitutional question is presented, and the issue is not properly justiciable before a three-judge court. The District Court was correct in its denial of plaintiff's motion to convene such three-judge court.

II.

Petitioners contend that the penalties contained in LSA-R.S. 40:961 et. seq. and 21 U.S.C. § 801 et. seq. violate the Eighth Amendment's prohibition of cruel and unusual punishment. Louisiana's law for the unlawful possession of marijuana provides for a fine of not more than $500.00 and/or imprisonment in the parish jail for not more than six months on a first conviction; on a second conviction, the offender shall be fined not more than $2,000.00 and/or imprisoned with or without hard labor for not more than five years; and, on a third or subsequent conviction, the offender shall be sentenced to imprisonment with or without hard labor for not more than twenty years. Additionally, LSA-R.S. 40:983 provides for

the conditional discharge of the offender for possession of marijuana as a first offense. In such an instance, the court may, without entering a judgement of guilt and with the consent of such person, defer proceedings and place him on probation upon such reasonable terms and conditions as may be required. Upon fulfillment of said terms and conditions of probation, the court shall discharge such person and dismiss the proceedings against him. Such disposition is without court adjudication of guilt and is not a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed on second or subsequent convictions under Louisiana's Second or Subsequent Offenses Statute.

By way of rebuttal to petitioners' Eighth Amendment claims, the Fifth Circuit upheld a sentence of *thirty years*' imprisonment upon conviction of possession of marijuana: "This Circuit has long followed the principle that a sentence within the statutory limits set by a legislature is not to be considered cruel or unusual". *Rener v. Beto*, 447 F. 2d 20, 23. In *U.S. v. Drotar*, 416 F. 2d 914, the same Court upheld a five year sentence for possession of marijuana, which included *denial of probation or parole*: "Punishment is not 'cruel and unusual' unless it is so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice". (Quoting *Rogers v. U.S.*, 304 F. 2d 520) Considering these decisions, to label Louisiana's system "cruel and unusual" would be untenable, arbitrary and illogical.

CONCLUSION

Much has been said in favor of legalizing or decriminalizing marijuana. An equal amount of condemnation of the drug has arisen from other well-qualified scientific circles. Respondents herein do not pretend to have the answer and this is precisely the issue: Unless, and until, concrete conclusions and facts are available regarding the effects of marijuana upon the individual and society, it is not within the Court's province to reverse the judgement of the legislature on constitutional grounds—society is simply not possessed of enough knowledge to bestow upon its members the right to use this drug, whose effects we are unsure of. Therefore, the State's respondents respectfully request that this Honorable Court find that no substantial constitutional question is presented herein, and that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Brief has been served on the following:

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Baton Rouge, Louisiana, this_____day of August, 1975.

_____

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